Supreme Court, U.S.
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No. 92-423

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

OWENS-ILLINOIS, INC.,
Petitioner

v.

FREDERIC E. ROBY and FRANCES A. SOLLY,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED

1. Do repetitive awards of punitive damages for the same course of conduct violate the Due Process Clause under the principles announced in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991)?

2. Is appellate review of a jury's award of punitive damages adequate under due process where neither the factors identified by the Court in *Haslip*, nor any similar factors, are taken into account?

3. Does Fed. R. Civ. P. 16 permit the admission of prejudicial evidence in direct contravention of a pretrial order?

RULE 29.1 STATEMENT

The statement required by Rule 29.1 was included in Petitioner's petition for certiorari.

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1. An important conflict among the federal and state courts has developed following this Court's decision in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991). The Sixth Circuit's decision below is in conflict both with the Third Circuit's recent decision in *Dunn v. HOVIC*, 1992 U.S. App. LEXIS 22749 (3d Cir. Sept. 18, 1992), and with the Fourth Circuit's *en banc* decision in *Johnson v. Hugo's Skateway*, 1992 U.S. App. LEXIS 21065 (4th Cir. Sept. 8, 1992).[1] Had the Sixth

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[1] *Hugo's Skateway* was decided the day Petitioner filed its petition for certiorari, while *Dunn* was decided ten days afterwards.

Circuit below applied *Haslip* as have the Third and Fourth Circuits, then the punitive damages award here could not have withstood appellate review.

The award of punitive damages against Owens-Illinois, Inc. ("Owens-Illinois") in this case was not subject to *any* substantive review for excessiveness by the trial or appellate courts. The trial court summarily denied Owens-Illinois' motion for remittitur of the punitive damages award on the grounds that "passion, prejudice or prejudicial error" apparently did not affect the verdict. *See*, Petitioner's Appendix at 33a (hereinafter "Pet. App."). On appeal, the Sixth Circuit did not apply any substantive standards, *see* Pet. App. at 13a-14a, thereby joining the Tenth and Fifth Circuits in failing to apply *Haslip*. *See Mason v. Texaco Inc.*, 948 F.2d 1546, 1560 (10th Cir. 1991) (punitive damages award reviewed only by application of a "shock the conscience" measure for excessiveness), *cert. denied*, 112 S. Ct. 1941 (1992); *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377, 1385 (5th Cir. 1991) (approving punitive damages award as "reasonable" without applying *Haslip* substantive standards).

The Third Circuit in *Dunn* performed what it described as an "analogous function" to the review by the Alabama Supreme Court that this Court approved in *Haslip*. *Dunn*, 1992 U.S. App. LEXIS 22749, at *55. This careful review using *Haslip* factors, and in particular the existence of other punitive awards against the appellant, led the Third Circuit to conclude that "the maximum amount of punitive damages that could reasonably have been awarded in this case is $1 million"—one-half the amount permitted by the district court. *Id.* at *76. While the court upheld the district court's review as basically consistent with *Haslip*, it also "recommen[ed] that in the future district courts *explicitly assess* the amount of a punitive damages award in light of the factors set out in comment e of the Restatement." *Id.* at *53 n.22 (citing *Restatement (Second) of Torts* § 908 cmt. e (1977)) (emphasis added). The *Restatement* factors are parallel to

the *Haslip* factors. The Third Circuit's application of the *Haslip* factors is in sharp contrast to the essentially standardless review employed by the Sixth Circuit.

In *Johnson*, the Fourth Circuit *en banc* vacated and remanded an award of punitive damages as inconsistent with the standards announced in *Haslip*. That court observed that substantive review by the state trial and appellate courts was "critical" to this Court's approval of Alabama law in *Haslip*, and determined that while Virginia law might provide sufficiently careful review, the federal court sitting in diversity is prohibited by the Seventh Amendment from applying those standards (which necessarily require taking new evidence) on review of a jury verdict. In the court's view, the "limited scope of review" afforded in federal court pursuant to Fed. R. Civ. P. 59 denied defendant due process. The court concluded that due process requires federal courts in diversity actions to compensate for this limited review by including in instructions to the jury substantive factors like those applied on review of an award of punitive damages awards by Alabama courts and approved in *Haslip*. *Johnson*, 1992 U.S. App. LEXIS 21065 at *9.

This split among the circuits illustrates that litigants are subject to widely different standards on review of awards of punitive damages for excessiveness. Yet respondents argue that this case—which provided no substantive review of an award of punitive damages despite the fact that a second jury heard the same evidence at the same time and did not award punitive damages—is not worthy of this Court's consideration because "no applicable federal appellate decisions conflict on any point raised" by the petition. *See* Brief in Opposition at 11. The inconsistency between the *Solly* and *Roby* punitive damages verdicts surely would have been corrected if subject to the review given punitive damages awards in the Third, Eighth and Eleventh Circuits, or if the juries had

been instructed as carefully as required in federal courts in the Fourth Circuit. The lack of care taken in the "review" of the *Roby* award is demonstrated by the Sixth Circuit's significant mischaracterization of the evidence: in weighing the sufficiency of the evidence in support of the award of punitive damages, the court describes a letter to Owen-Illinois that characterized Kaylo (Owens-Illinois' product) as a hazard to employees engaged in its manufacture and in installation. Pet. App. at 13a. Respondents repeat this misstatement. Brief in Opposition at 4-5. In fact, the letter to which both the Sixth Circuit and respondents refer was a letter *from* Owens-Illinois to a laboratory *asking* whether the product presented a hazard.

This inaccurate portrayal of the evidence is but one example of the haphazard review conducted of the *Roby* award of punitive damages. The lack of substantive review at the trial and appellate levels, together with the disparity in the jury verdicts, make this case an appropriate vehicle for this Court to clarify the principles announced in *Haslip* and remedy the disparate treatment of punitive damages litigants.

2. Respondents argue that any due process limitation on multiple awards of punitive damages for the same course of conduct will undermine a state's interest in punishing and deterring wrongful conduct. Brief in Opposition at 18. Respondents assume that a due process limitation will result in one punitive damages award to the lucky plaintiff who first obtains a verdict. *See id.* at 19 ("If only one punitive damage recovery were allowed, a defendant could calculate the award into the cost of doing business.").

Respondents' argument misconstrues the application of a limitation on repeated awards of punitive damages for a single course of conduct: while one amount might be

assessed as the total sum of punitive damages appropriate, the plaintiffs harmed by the conduct would obtain a share of that sum. The state's interest in safeguarding the rights of its citizens is fully protected by the division of a punitive damages award among all injured parties.

Respondents' position fails to consider this Court's determination in *Haslip* that due process *requires* that punitive damages awards not exceed the amount necessary to serve the societal goals of retribution and deterrence. *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1044-45 (1991). Without a uniform rule to ensure that a defendant is assessed only the amount of punitive damages necessary to punish and deter a single course of conduct, courts lack the means necessary to weigh other awards with the confidence that awards (and litigants) in other states will be subject to the same process. *See Juzwin v. Amtorg Trading Corp.*, 718 F. Supp. 1233, 1235 (D.N.J. 1989) (concluding that multiple awards of punitive damages violate due process but allowing award to stand since lack of nation-wide uniformity leaves court "powerless to fashion a remedy which will protect the due process rights of the defendant").

Respondents also argue that the record in this case is insufficient to determine whether previous punitive damages awards paid by Owens-Illinois "reach[] the maximum tolerable under due process." Brief in Opposition at 15. Respondents acknowledge that Owens-Illinois submitted evidence of these awards to the trial and appellate courts below. *See* Brief in Opposition at 5, 15 (affidavits submitted testifying to payment of two awards totalling $1.3 million). The trial court apparently did not consider this evidence at all, and the Sixth Circuit determined that it did not need to do so, since it rejected Owens-Illinois' due process challenge to repeated punishment for the same course of conduct. As evidenced by this failure to consider prior awards, respondents' argument overlooks the fact that there is no mechanism in Ohio law to permit

the court to weigh the payment of other punitive damages awards and determine "the maximum tolerable under due process."

The *Roby* punitive damages award is unconstitutional because Owens-Illinois already has paid punitive damages for the course of conduct alleged in this case. Multiple awards violate the due process principles announced in *Haslip*, and this case presents the appropriate vehicle for this Court to consider the due process concerns implicated by repetitive awards of punitive damages for a single course of conduct.

Respectfully submitted,

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